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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY ABRAHAM MARTINEZ,

Defendant and Appellant.

D074695

(Super. Ct. No. RIF1702994)

APPEAL from a judgment of the Superior Court of Riverside County, Patrick F. Magers, Judge. (Judge of the Riverside Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed and remanded for resentencing.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Robin Urbanski and Kristen Kinnaird Chenelia, Deputy Attorneys General for Plaintiff and Respondent.

A jury convicted Anthony Martinez of one count of possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1))¹ and six counts of vandalism (§ 594, subds. (a), (b)(2)(A)); and the jury found all the crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22, subds. (b)(1)(A), (d)). The trial court sentenced Martinez to 12 years in state prison. On appeal, Martinez contends there is insufficient evidence to support the gang enhancements, his case must be remanded for resentencing, and certain errors in the sentencing minutes and abstract of judgment require correction. We reject Martinez's claim regarding insufficiency of the evidence to support the gang enhancements. We also reject Martinez's argument that the trial court failed to exercise its sentencing discretion by failing to determine whether to sentence the vandalism counts as misdemeanors or felonies. However, we agree that remand for resentencing is warranted to allow the trial court to determine whether to strike Martinez's five-year enhancement under sections 667, subdivision (a)(1) and 1385, as amended effective January 1, 2019. We provide further directions, *post*, regarding the scope of the resentencing and corrections that are needed on the abstract of judgment. In all other respects, the judgment is affirmed.

¹ All statutory references are to the Penal Code.

BACKGROUND

A. Charges

Martinez was charged with unlawful possession of a handgun by a felon, in violation of section 29800, subdivision (a)(1) (count 1), and seven counts of vandalism, in violation of section 594, subdivisions (a) & (b)(2)(A) (count 2, graffiti in a parking lot; count 3, graffiti at a dance studio; count 4, graffiti at a marijuana dispensary; count 5, graffiti on city property; count 6, graffiti at a laundromat; count 7, graffiti at a mobile home park; and count 8, graffiti at a café). The information alleged that Martinez committed the crimes for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members, within the meaning of section 186.22, subdivision (b)(1)(A) (count 1) and subdivision (d) (counts 2 through 8). The information also alleged that Martinez committed three prior offenses within the meaning of section 667.5, subdivision (b); one serious prior felony within the meaning of section 667, subdivision (a); and one strike prior within the meaning of sections 667, subdivisions (c) and (e)(1), and 1170.12, subdivision (c)(1).

B. Trial

1. Gang Evidence

The prosecution's gang expert was a member of the gang task force and a deputy at the Jurupa Valley Station of the Riverside County Sheriff's Department. He testified that Glen Avon and Mira Loma are neighborhoods within Jurupa Valley that were

experiencing "a lot of gang problems," including "gang shootings, violence, graffiti, that sort of thing."

The deputy testified that one of the gangs active in the area was Cuatro Flats, a Los Angeles-based gang with a "clique" in Glen Avon in Jurupa Valley. "A clique is a subset of the gang itself. It's the gang, and they have different cliques, subsets." The Cuatro Flats gang originated in the Boyle Heights area of Los Angeles, east of the Los Angeles River, in an area that is flat, near a street called 4th Street. It derived its name, Cuatro (meaning four in Spanish) Flats, from this locale. The gang is primarily comprised of Hispanics.² In the 1990's, several members of the Los Angeles gang moved to Jurupa Valley and Glen Avon, where they started a clique of that gang; within this Riverside County clique was a group sometimes referred to as the "Night Owls." The deputy testified that there were five active members of Cuatro Flats in Riverside County, and several inactive members,³ while there were 90 active Cuatro Flats members in Los Angeles County. The following colloquy took place:

"Q. All right. So for the gang of Cuatro Flats, the entire gang, what are their primary activities?

"A. Carrying loaded firearms, assault with a deadly weapon, vandalism.

"Q. Does the gang itself also traffic in narcotic[s]?

² The deputy subsequently testified that Hispanic gangs allow White members, but usually, in Southern California, do not allow Black members.

³ The deputy explained that an "inactive" gang member was someone with previous contacts and arrests in the area but who had not been arrested "in a while."

"A. Narcotic sales, yes.

"Q. And when the gang itself has enemies or rival gangs, do they also have—include in their primary activities assaults or even murders?

"A. Yes.

"Q. In your opinion, is Cuatro Flats a criminal street gang?

"A. Yes."

Other gangs in the Jurupa Valley area are Florencia 13, a gang that originated in South Central Los Angeles and set up a clique in Jurupa Valley,⁴ and Mira Loma Dodd Street, a Mira Loma-based gang, which the deputy described as a "local" gang with a significant presence (over 100 members) in Riverside County. He explained that the three gangs' territories overlapped, and they would mark their territory with graffiti as a way to claim their territory, allowing them to "commit drug sales, operate their business," and as a way to intimidate the public, allowing them to "operate freely without witness participation, without law enforcement presence," enabling them to continue to commit crimes. When one gang encountered a rival gang's graffiti in their area, they would cross it out as a challenge or an act of opposition to the rival. Cuatro Flats and Mira Loma are rivals.

The deputy testified he first came into contact with Martinez on June 6, 2017. Martinez was not wearing a shirt, and the deputy observed that Martinez had the word "Flats" tattooed on the back of his head; he also has the words "Four Life" tattooed on his

⁴ The deputy did not know how many members of Florencia 13 were active within Riverside County, but it was more than three.

chest above his heart, along with a picture of a child. Upon observing these tattoos, the deputy "immediately thought [they] represented Cuatro Flats." Although Martinez denied membership in the gang, the deputy believed Martinez was indeed a member of the Cuatro Flats gang.

2. Evidence Regarding the Charges

On July 7, 2017, the deputy observed new graffiti spray-painted near a dance studio and throughout the surrounding shopping center. The graffiti consisted of black spray paint, with the letters, "C," "X," "F," and "L," representing Cuatro Flats. He observed "V" with a downward pointing line, representing "vario" or "[h]ere, this is our territory." He observed "C," "4," "E," which he testified signified Cuatro Flats "east." He reiterated that Cuatro Flats was a clique of the Los Angeles-based gang, and "the east correspond[ed] to that." Then he testified that "The NLS" stood for "The Night Owls," which was another part of the Cuatro Flats Jurupa branch. He also observed "A" heart "S," which the deputy initially interpreted to have no gang meaning. (Count 3.)

That same day, on a wall within the same shopping center, the deputy observed white graffiti stating, "IV F," representing Cuatro Flats, and "2 Face," which he believed was the gang moniker of the person who wrote the vandalism. The deputy testified that, in gang culture, monikers (aliases or nicknames) were highly significant, and that "[i]f someone is assigned a moniker, they have to represent it. They have to put work in for it." Also in white graffiti was "ES," meaning east side, "C" and "IV," meaning Cuatro Flats, and "Flats" written with the "L" and "A" like the logo of the Los Angeles Dodgers. The following colloquy occurred:

"Q. All right. Let's break that down now. Can you tell us what, if any, meaning does this graffiti have?

"A. They're representing the Cuatro Flats gang, and they're representing Los Angeles." (Count 2.)

In July 2017, Martinez engaged in an argument with a security guard at a nearby marijuana dispensary. The following day, new tagging appeared outside the dispensary, as well as other parts of the shopping center. The security guard testified the new tagging included references to "2 Face" and "4F." Video surveillance taken at the dispensary on July 11, 2017 depicted Martinez tagging the store. A store employee testified that the graffiti, which was not there the day before, included the name "2 Face." She also testified that Martinez was a customer at the store, where they kept copies of customer's photo IDs. (Count 4.)

On July 11, the deputy observed on walls of a café nearby new graffiti that said, "Flats," with a downward pointing arrow, "CF, Cuatro Flats here." He testified this indicated the Cuatro Flats gang members were claiming that area. He later observed that this graffiti had been defaced: in different spray paint, he observed "Fuck catfish" had been written over "CF," to disrespect Cuatro Flats by calling them catfish, and "MLRXIII," had been written, indicating Mira Loma Riva 13. The deputy testified this appeared to be a response from Mira Loma. He later observed the same graffiti had been defaced again, with the vandal writing, "CF," "Flats," "Come get some," with the "M" crossed out, and "2 Face." This indicated to the deputy that, after Mira Loma had "disrespected" Cuatro Flats by "crossing them out," "Cuatro Flats came back and disrespected them and added . . . a challenge to them." (Count 8.)

On July 11, the deputy observed Cuatro Flats graffiti, including the moniker "2 Face," near the walls of a laundromat located near the café. This graffiti, too, was defaced in similar ways over the next few days, which the deputy interpreted to be a response from Mira Loma. (Count 6.)

On July 11, near a mobile home park, the deputy observed more Cuatro Flats "tagging," including "C," "4," and "F," as well as three monikers: "Drowsy," "Stalker," and "2 Face."⁵ A few days later, at the same location, the deputy observed that the graffiti had been changed. The monikers were crossed out or defaced, and the "F" and "C" were crossed out. The "L" was crossed out of "Stalker," which signified disrespecting Loma from Mira Loma. Later, the deputy observed that the graffiti that had defaced the original Cuatro Flats tagging itself was crossed out. (Count 7.)

Between July 11 and July 13, the deputy noticed more Cuatro Flats tagging on street signs and utility boxes. On a street sign, he observed, "2 Face," "4th Street" and "F," which represented Cuatro Flats. On an electrical utility box, he observed, "C," "4," "F," all of which represented Cuatro Flats, and the moniker "2 Face." (Count 5.)

On July 20, a probation officer and a parole agent waited at a shopping center, hoping to make contact with Martinez. When they saw him there with a cohort, they notified the sheriff's department. The deputy and his partner responded. Martinez and his cohort looked in the direction of the deputies and then "took off running." The deputies pursued Martinez. The deputy and his partner lost sight of Martinez during the

⁵ The deputy testified he did not know the identities of "Drowsy" or "Stalker."

pursuit, but observed he was wearing a blue and white checkered shirt, a black baseball cap, and jeans. The probation officer also pursued Martinez and observed him stop at some bushes, where he leaned over, grabbed something from his pocket, placed it within the bushes, and then continued running. Martinez "got away."

The probation officer inspected the bushes where Martinez had apparently discarded something; he found a black pistol inside a holster. The probation officer waited with the pistol until a sergeant from the Riverside County Sheriff's Department arrived to process the weapon. The sergeant testified that the weapon was loaded and had a bullet in the chamber; no fingerprints were found on it. The sergeant identified the weapon as a black 9-millimeter Hi-Point handgun, and testified that it was loaded with seven 9-millimeter hollow-point bullets. (Count 1.)

On August 17, deputies surrounded an apartment complex, attempting to locate Martinez. Martinez jumped a fence near an open window in one of the apartments and was promptly apprehended. Inside the apartment, deputies observed graffiti on the walls, including the moniker "2 Face," "4," "Flats," and "Cuatro Flats," which the deputy testified represented more Cuatro Flats tagging. The deputy also observed in the apartment a graffiti heart with the name "Stacey" inside it; he testified this graffiti added significance to the "A heart S" he had previously seen at the nearby shopping center, which he opined likely stood for "Anthony [Martinez] loves Stacey." On the apartment floor, the deputy saw a blue and white checkered shirt that looked similar to the one he saw Martinez wearing when he fled from deputies.

The apartment was rented to Stacey L., but she was not there when Martinez was apprehended. Stacey's landlord testified that he recognized Martinez as a visitor of Stacey's. He also testified that he had observed vandalism on the walls of his building bearing the moniker "2 Face."

After August 17, when Martinez was arrested, the deputy did not see any graffiti bearing the moniker "2 Face."

3. Predicate Offenses

The prosecution introduced evidence of two predicate gang acts: felonies committed in Riverside County by Steven McCrary and Danny Martinez, both of whom were self-admitted members of the Cuatro Flats gang. The deputy testified that Steven McCrary goes by the moniker "Loony" and has several Cuatro Flats tattoos (including "IV," "Flats," "Cuatro Flats," "C," and "F"), as well as a tattoo on his chest that says "Night Owls," associated with the Cuatro Flats clique in Jurupa Valley. Danny Martinez goes by the moniker "Skippy." The deputy reiterated his opinion that defendant Martinez is also a member of Cuatro Flats, and his moniker is "2 Face."⁶

4. Additional Gang Evidence

The deputy testified that Cuatro Flats was a well-established Hispanic street gang and that there would be severe repercussions for persons who were not members of the gang to display gang tattoos or spray gang graffiti. The deputy opined that "these

⁶ The deputy provided the bases for his opinion, including his review of records; conversations with family members, people in the community, and "people who were associates of [Martinez]"; photographs; and Martinez's tattoos.

particular sets of graffiti, the ones . . . attributed to 2 Face," were done for the purpose of benefitting, furthering, or assisting the purposes of the Cuatro Flats gang, "because they're actually putting it out there in public so other people could see. Members of the public see it, they fear it. They know it's a gang area. It's making Cuatro Flats known, [t]his is our area." The deputy was presented with a hypothetical mirroring the underlying facts in this case. He opined that, where an individual vandalized an area with gang graffiti and possessed a loaded weapon while remaining in the tagged area, that individual was possessing the firearm to benefit, further, or assist the gang because "he's there protecting the graffiti, the area. The whole crossing out of a rival gang, he's arming himself in case he comes into confrontation with the other gang" and "preparing himself for offense or defense." Finally, the deputy opined, given the hypothetical of a gang member with gang tattoos, possessing a gun "right in the middle of a situation where two gangs, one his, one the rival, are crossing each other out and issuing challenges," that the individual possessed the gun for the purpose of "that ongoing [gang] war."

The parties stipulated that Martinez was previously convicted of a felony offense on July 31, 2014. The parties further stipulated, with respect to the vandalism charges, that Martinez did not have an ownership interest in any of the properties alleged to be vandalized with graffiti. The court took judicial notice that Danny Martinez and Steven McCrary were convicted of felonies in Riverside County.

5. Verdict and Sentencing

The jury found Martinez not guilty of count 3 (relating to graffiti at the dance studio) but found him guilty on all other charged counts and made true findings as to all

related allegations. The trial court struck one prison prior and found the remaining prior allegations true. The trial court sentenced Martinez to a total term of 12 years in prison, comprised of the middle term of two years on count 1, doubled to four years because of the strike prior, plus the middle term of three years for the enhancement; concurrent four-year terms on all remaining counts, and the then-mandatory five-year consecutive term for the prior serious felony conviction.⁷

DISCUSSION

A. *Substantial Evidence Supports the Gang Enhancements*

Relying on *Prunty*,⁸ Martinez contends the evidence is insufficient to support the gang enhancements under section 186.22, subdivision (b)(1)(A) because the prosecution failed to establish an associational or organizational connection between "the small Cuatro Flats gang in Riverside" and the "much larger Cuatro Flats gang in Los Angeles." We conclude *Prunty* does not apply and therefore affirm the gang enhancements.

1. *Background*

Section 186.22, subdivision (b)(1) provides a sentencing enhancement for felonies "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1); see *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130, fn. 5 [enhancements apply (1) to gang-related offenses, (2) where the

⁷ The trial court struck the prison priors.

⁸ *People v. Prunty* (2015) 62 Cal.4th 59, 67 (*Prunty*).

defendant acts "with the specific intent to promote, further, or assist any criminal conduct by gang members."].)

Section 186.22, subdivision (f) defines " 'criminal street gang' " as "any 'ongoing organization, association, or group of three or more persons' that shares a common name or common identifying symbol; that has as one of its 'primary activities' the commission of certain enumerated offenses; and 'whose members individually or collectively' have committed or attempted to commit certain predicate offenses." (*Prunty, supra*, 62 Cal.4th at p. 67; § 186.22, subd. (f).)

When a reviewing court considers a claim that the evidence is insufficient to support a verdict, it considers the entire record in the light most favorable to the prosecution and presumes in support of the verdict the existence of every fact the jury could reasonably have deduced from the evidence. (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1104.) "We apply a deferential standard of review when evaluating . . . whether the evidence in this case was sufficient to satisfy the [Street Terrorism Enforcement and Prevention] Act's definition." (*Prunty, supra*, 62 Cal.4th at p. 71.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

2. Analysis

Martinez's argument on appeal is premised on the claim that *Prunty* applies. He contends the gang expert testified that the Los Angeles Cuatro Flats gang has a small subset in Riverside, but failed to prove an associational or organizational connection

between the larger Cuatro Flats gang and the Riverside subset. Conversely, the Attorney General contends *Prunty* does not apply because the prosecution did not rely on a different gang subset to prove the gang enhancements, and there was sufficient evidence of a connection between the Riverside Cuatro Flats and the larger Cuatro Flats organization even if *Prunty* were applicable. We agree that *Prunty* does not provide a basis for reversing the gang enhancements here.

In *Prunty*, the Supreme Court held that where "the prosecution's case positing the existence of a single 'criminal street gang' . . . turns on the existence and conduct of one or more gang subsets, . . . the prosecution must show some associational or organizational connection uniting those subsets." (*Prunty, supra*, 62 Cal.4th at p. 71.) The evidence in *Prunty* was insufficient because, there, "the prosecution did not introduce sufficient evidence showing a connection among the subsets it alleged comprised a criminal street gang." (*Id.* at p. 68.) The prosecution argued that the defendant was a member of the Detroit Boulevard Norteño "set," but introduced predicate offense evidence relating to three *different* subsets of Norteños: one incident involving a confrontation between the Varrio Gardenland Norteños and the Del Paso Heights Norteños, and a second incident in which members of the Varrio Centro Norteños shot at a former Norteño gang member. (*Id.* at p. 69.) Although the subsets shared the "Norteño" name, there was "no evidence that could connect these groups together, or to an overarching Sacramento-area Norteño criminal street gang." (*Id.* at p. 82.)

Here, unlike in *Prunty*, the prosecution's showing of a "criminal street gang" did not turn on the existence and conduct of multiple subsets. Rather, the prosecution

established that Martinez was a member of the Cuatro Flats gang, and that he committed his crimes for the benefit of, in association with, or at the direction of the Cuatro Flats gang. Although the gang expert explained that certain Cuatro Flats members had moved from Los Angeles to Riverside County, establishing a Riverside "clique," his testimony does not show that the Riverside members were comparable to the various subsets at issue in *Prunty*. Here, the only difference between the Riverside and Los Angeles Cuatro Flats members was their location. *Prunty* does not preclude the prosecution from satisfying its burden of showing a criminal street gang in such circumstances. As the Supreme Court emphasized: "We have previously upheld gang enhancements where the 'criminal street gang' in question was a geographically dispersed group. [Citation.] . . . [N]othing in our opinion reflects doubt that prosecutors can prove the existence of such a criminal street gang when the evidence supports such a conclusion." (*Prunty*, *supra*, 62 Cal.4th at p. 85.)

Also unlike *Prunty*, the prosecution here did not allege the predicate offenses were committed by persons in unrelated subsets. Instead, the prosecution presented evidence that the individuals who committed the predicate offenses were members of the same group, Cuatro Flats, committing crimes in the same geographic location, Riverside County. Specifically, the gang expert testified that there were five active members of Cuatro Flats in Riverside County, he believed Martinez was a member of Cuatro Flats, and both Danny Martinez and Steven McCrary (who committed the predicate offenses in Riverside County), were self-admitted members of the Cuatro Flats gang. We conclude this evidence is sufficient to support the gang enhancement. (*People v. Pettie* (2017)

16 Cal.App.5th 23, 49-50 [evidence was sufficient to establish the Norteños were a criminal street gang, despite evidence of various Norteño cliques, where the theory was that defendants were Norteños, not members of any subset, and predicate offenses were committed by Norteño gang members]; *People v. Ewing* (2016) 244 Cal.App.4th 359, 372 [*Prunty* did not apply where prosecution did not proffer predicate crimes of subset gang members to prove existence of a criminal street gang].)⁹

In sum, the evidence shows that "the gang the defendant sought to benefit, the individuals that the prosecution claims constitute an 'organization, association, or group,' and the group whose actions the prosecution alleges satisfy the 'primary activities' and predicate offense requirements of section 186.22[, subdivision] (f), [are] one and the same." (*Prunty, supra*, 62 Cal.4th at pp. 75-76.) Because *Prunty* does not apply here, we reject Martinez's claim that the evidence supporting the criminal street gang enhancements was insufficient.¹⁰

B. *The Trial Court Did Not Commit Error in Sentencing the Vandalism Charges*

Martinez argues that remand for resentencing is required because there is no evidence in the record that the trial court exercised its discretion to sentence the

⁹ Brief references to the "Night Owls" do not change our conclusion. The gang expert testified that the "Night Owls" were a clique within the Cuatro Flats members in Riverside County. There was evidence that certain graffiti referencing Cuatro Flats also referenced "Night Owls," and McCrary had a "Night Owls" tattoo in addition to various Cuatro Flats tattoos. This evidence does not undermine the inference that there was a single, overarching criminal street gang at issue here, i.e., the Cuatro Flats gang. (*Prunty, supra*, 62 Cal.4th at pp. 78-79.)

¹⁰ Given our conclusion, we need not address the Attorney General's alternative argument that the evidence was sufficient even assuming *Prunty* were applicable.

underlying section 594, subdivision (a) and (b)(2)(A) convictions alternatively as felonies or misdemeanors. Although we conclude the trial court did not commit any error, we are remanding for resentencing for other reasons discussed *post*. The trial court may consider the entire sentencing scheme on remand—including whether to sentence the vandalism counts as misdemeanors or felonies.

1. *Background*

Martinez was convicted in counts 2 and 4 through 8 of vandalism under section 594, subdivision (a) and (b)(2)(A). The statute defines these offenses as misdemeanors. (§ 594, subd. (b)(2)(A).) These counts, however, were alleged to have been committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, and assist in criminal conduct by gang members, within the meaning of section 186.22, subdivision (d), which renders them "wobblers," that is, able to be sentenced as misdemeanors *or* felonies. (*People v. Arroyas* (2002) 96 Cal.App.4th 1439, 1443, fn. 3. (*Arroyas*).)

Following a court trial on the bifurcated prior convictions, the trial court asked the parties if they wanted to refer the case to probation. The following exchange occurred:

"[Defense counsel]: Maybe we can do the indicated from the Court.

"The court: Okay. Let's go into chambers and talk about it. He has a right to a probation officer's report.

"[Defense counsel]: I told him that. He wanted me to at least find out what the Court is thinking."

The parties had an off-the-record discussion, where the court provided an indicated sentence. On the record, the court offered to have the case referred to

probation, which would result in another trial judge imposing sentence, because the judge would not be available. Martinez expressed his desire to be sentenced as indicated. The trial court imposed the middle term of two years doubled to concurrent four-year terms, as authorized under section 186.22, subdivision (d).

2. *Analysis*

Section 186.22, subdivision (d) gives the sentencing court discretion to sentence the misdemeanor offense of section 594, subdivision (a) and (b)(2)(A), with which Martinez was charged in counts 2 through 8, as a felony. (See *Arroyas, supra*, 96 Cal.App.4th at p. 1444 [defendant convicted of misdemeanor vandalism with a gang enhancement "became subject to felony sentencing at the discretion of the trial judge"].) The relevant portion of section 186.22, subdivision (d) provides:

"Any person who is convicted of a public offense punishable as a felony or a misdemeanor, which is committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall be punished by imprisonment in a county jail not to exceed one year, or by imprisonment in a state prison for one, two or three years"

Martinez argues in his opening brief that there is "no indication that the trial court was aware that it had discretion to impose a misdemeanor sentence on the vandalism counts," and thus, "as a matter of law, [the trial court] did not exercise [its] legal discretion," requiring reversal. The Attorney General correctly points out, however, that a "trial court is presumed to have been aware of and followed the applicable law." (*People v. Mosley* (1997) 53 Cal.App.4th 489, 496 ["general rules concerning the presumption of regularity of judicial exercises of discretion apply to sentencing issues"].)

On reply, Martinez acknowledges this presumption but, in light of the absence of an affirmative record indicating the trial court was aware of and exercised its discretion, Martinez requests we remand to the trial court "for a definitive resolution of the issue."

We conclude Martinez forfeited this claim by failing to object (*People v. Scott* (1994) 9 Cal.4th 331, 351, 353), and he has failed to establish error on the merits. We agree with the Attorney General that, absent an affirmative showing in the record that the trial court was unaware of its discretion, the judgment is presumed correct. (*People v. Alvarez* (1996) 49 Cal.App.4th 679, 694-695 ["We decline to automatically presume the trial court erroneously believed it had no discretion [in sentencing matters] in the absence of some affirmative showing that it misunderstood its discretion. To do so would require us to engage in pure speculation, and violate a basic tenet of appellate review."].)¹¹ Nonetheless, the trial court may consider this issue—whether to sentence counts 2 and 4 through 8 as misdemeanors or felonies—along with the entire sentencing scheme when it considers whether to strike the previously mandatory five-year enhancement (as we discuss *post*). (See *People v. Buycks* (2018) 5 Cal.5th 857, 893 [under the full resentencing rule, "when part of a sentence is stricken on review, on remand for resentencing 'a full resentencing as to all counts is appropriate, so the trial court can

¹¹ Martinez's reliance on *People v. Downey* (2000) 82 Cal.App.4th 899 for the proposition that remand for resentencing is required here is misplaced. In *Downey*, it was apparent from the record that the trial court's sentencing choice was based on an erroneous understanding of the law. (*Id.* at p. 912.) By contrast, here, there is no evidence showing the trial court misapprehended the law or its sentencing discretion. Because there is no evidence that the trial court abused its sentencing discretion, Martinez's claim that his due process rights were violated (relying on *Hicks v. Okla.* (1980) 447 U.S. 343, 346) similarly fails.

exercise its sentencing discretion in light of the changed circumstances.' "].) We express no opinion on how the court should exercise its discretion.¹²

C. The Sentencing Minutes and Abstract of Judgment

Martinez argues, and the Attorney General agrees, that the trial court minutes and abstract of judgment are inaccurate and require correction.

The parties agree that the abstract of judgment erroneously states that Martinez was convicted in counts 2, 4, 5, 6, 7, and 8 of "Vandalism >\$5000"; however, the jury convicted Martinez of vandalism with no monetary finding. The reference to ">\$5000" is therefore erroneous. "It is, of course, important that courts correct errors and omissions in abstracts of judgment." (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 (*Mitchell*).) On remand, we direct the trial court to prepare an amended abstract of judgment to correct this error.

The parties further agree that both the minute order and abstract of judgment indicate Martinez was sentenced to four years for each vandalism conviction (which is consistent with the trial court's oral pronouncement at sentencing) *plus* an additional three years for the gang enhancement (which is inconsistent with the oral pronouncement). The oral pronouncement controls. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385 ["[w]here there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls"]; see *Mitchell, supra*, 26 Cal.4th at pp. 185-186 [appellate court has the authority to order the

¹² Given this conclusion, we need not address Martinez's claim that counsel was ineffective for failing "to object to the trial court's failure to exercise discretion" to sentence Martinez to misdemeanors.

abstract of judgment to be corrected if it does not accurately reflect the trial court's oral pronouncement of judgment].) On remand, the trial court shall ensure that the abstract of judgment reflects the sentence as orally imposed.

D. Martinez Is Entitled to Remand for Resentencing Under Amended Sections 667 and 1385

Martinez contends his case should be remanded for resentencing pursuant to sections 667 and 1385, as amended by Senate Bill No. 1393. Based on these amendments, effective January 1, 2019, the trial court may exercise discretion to strike a formerly mandatory five-year enhancement applicable to defendants who have suffered a prior serious felony conviction. (Stats. 2018, ch. 1013, §§ 1-2.) Martinez and the Attorney General agree that the amendments apply where, as here, a defendant's conviction is not yet final. (See *In re Estrada* (1965) 63 Cal.2d 740, 744; *People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) We agree and therefore remand for resentencing under sections 667 and 1385, as amended by Senate Bill No. 1393. We express no opinion on how the trial court should exercise its discretion.

DISPOSITION

The sentence is vacated and the matter is remanded for resentencing to allow the trial court to determine whether to strike Martinez's five-year enhancement under Penal Code sections 667, subdivision (a)(1) and 1385, and to determine whether to sentence counts 2, 4, 5, 6, 7, and 8 as misdemeanors or felonies.

On remand following resentencing, the trial court shall ensure the abstract of judgment omits any reference to ">\$5000" as to counts 2, 4, 5, 6, 7, and 8, and that the abstract of judgment reflects the sentence as orally imposed.

In all other respects, the judgment is affirmed.

GUERRERO, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.